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No. 77-1756

In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS W. SHERWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is reported at 568 F. 2d 771. The district court's memorandum and order denying post-trial relief (Pet. App. 24a-34a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1978. The petition for a writ of certiorari was filed on May 8, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in not charging the jury that it had to find that petitioner's materials appealed to the prurient interests of a deviant group.

2. Whether the government failed to satisfy its burden of proof.

3. Whether the trial court abused its discretion in denying petitioner's request for a continuance.

4. Whether the government violated its obligation under *Brady* v. *Maryland*, 373 U.S. 83, to supply information petitioner requested from the Internal Revenue Service.

5. Whether the indictment should have been dismissed because the prosecutor allegedly failed to inform the grand jury of the elements of petitioner's offense.

6. Whether the indictment properly charged petitioner with multiple violations of 18 U.S.C. 1461.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of 27 counts of mailing obscene material, obscene advertisements, and information on how to obtain obscene materials, in violation of 18 U.S.C. 1461. Petitioner was fined $27,000 and placed on three years' probation. The court of appeals affirmed by judgment order (Pet. App. 1a-3a).

The evidence at trial showed that Postal Inspector John Ruberti, assigned to investigate violations of the obscenity laws, ordered and received a quantity of magazines, advertisements and films from petitioner's catalog (Tr. 88-96). These materials depicted homosexual and heterosexual acts of sodomy, masturbation, intercourse and oral-genital contact (Tr. 506).

ARGUMENT

1. Petitioner contends (Pet. 5-7) that the district court erred in not charging the jury that, in order to convict, it had to find that the materials appealed to the prurient interests of a deviant group. Petitioner failed to object to the court's instructions before the jury retired (Tr. 527-528), and thus should not be allowed to object now. See Rule 30, Fed. R. Crim. P.; *Henderson* v. *Kibbe*, 431 U.S. 145, 154; *United States* v. *Bennett*, 563 F. 2d 879, 882 (C.A. 8); *United States* v. *Wild*, 422 F. 2d 34, 37 (C.A. 2), certiorari denied, 402 U.S. 986.

In any event, the district court's instruction was not erroneous. It required the jury to consider whether the "average person," applying community standards, would find that the work, taken as a whole, appealed to "prurient interest" (Tr. 510-514). That is all that was necessary. See *Hamling* v. *United States*, 418 U.S. 87, 107; *Miller* v. *California*, 413 U.S. 15, 24. Although the court may require that the jury decide whether the material appeals to the prurient interests of members of deviant social groups, such an instruction is not essential. Cf. *Pinkus* v. *United States*, No. 77-39, decided May 23, 1978, slip op. 9.[1]

Moreover, even assuming that such an instruction should have been given, petitioner was not prejudiced by

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[1]This Court's decision in *Mishkin* v. *New York*, 383 U.S. 502, is not on point. That case dealt with the question whether materials designed for, and primarily disseminated to, a clearly defined deviant sexual group, rather than the public at large, satisfied the test of prurient appeal in *Roth* v. *United States*, 354 U.S. 476. This Court concluded that the reference to the "average" or "normal" person in *Roth* did not foreclose consideration of the appeal of such materials to their "probable recipient group." *Mishkin* v. *New York*, *supra*, 383 U.S. at 509. *Mishkin* thus does not support petitioner's contention that the failure to instruct with regard to deviant groups requires reversal.

its omission, because these materials were more likely to appeal to the prurient interests of homosexuals than to those of average persons. See Pet. 8; *Hamling* v. *United States*, *supra*.

2. Petitioner also contends (Pet. 7-9) that the government failed to prove that the materials appealed to the prurient interests of a deviant audience because there was no expert testimony to that effect.

But "[w]hether materials are obscene generally can be decided by viewing them; expert testimony is not necessary." *Pinkus* v. *United States*, *supra*, slip op. 9. See *Hamling* v. *United States*, *supra*, 418 U.S. at 100; *Ginzburg* v. *United States*, 383 U.S. 463, 465. Petitioner's claim is that the materials supposedly appealed to a "bizarre deviant group," and so expert testimony was necessary. See *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56 n. 6. However, this was not an "extreme" case where the trier of facts was "plainly inadequate" to judge the appeal of the materials. See *Pinkus* v. *United States*, *supra*, slip op. 10. The fact that many of the materials were produced for homosexuals does not require expert testimony on their obscenity *vel non*. The hypothetical "bizarre deviant groups" which *Slaton* mentioned were those of which even a present-day jury would be ignorant. Homosexual activity is not so bizarre that a jury cannot comprehend it.

3. Petitioner further contends (Pet. 9-13) that the court improperly denied his request, just prior to trial, for a continuance.

Shortly before trial, petitioner learned that in April 1976, the Internal Revenue Service (IRS) had seized the contents of an adult bookstore in Philadelphia in satisfaction of tax liabilities, and had sold the contents after soliciting bids through the mails. Petitioner believed that some items sold were identical to those involved in

petitioner's case, and he requested information from government counsel relating to this sale. Government counsel was unaware of the sale but sought IRS' help in locating what was requested. Late on November 5, a Friday, the prosecutor received from IRS the notice of seizure listing the items seized, three notices of sale and the certificate of sale; he turned these over to petitioner's counsel the following Monday morning before trial (Tr. 1-11). Petitioner then sought a continuance, which the court denied.

The record plainly contradicts petitioner's claim that he was prejudiced by the denial of the continuance. At trial, petitioner's witnesses included the IRS revenue officer who had conducted the seizure and sale of the materials in the earlier case and the purchasers of those materials. Their testimony established that the IRS seized sexually explicit materials, advertised their sale through the mails, and sold items identical to some of those specified in petitioner's indictment. Given this testimony, it is difficult to see what a continuance would have added to petitioner's argument that, by selling these items, the government deemed that they did not offend community standards. In fact, petitioner's sole claim is that with more time he could have obtained the actual materials sold by IRS. Even assuming that he could have done so, denial of the continuance was not error. The testimony presented clearly proved petitioner's point.[2] A denial of a

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[2]To be sure, it is an embarrassment that the Department of Justice should find itself prosecuting petitioner for distributing materials which another agency of the United States government recently had publicly sold. On March 23, 1977 (following petitioner's conviction), the IRS issued a supplement to IRM 5341.1 ordering that IRS agents contact local authorities immediately after seizing possibly obscene materials, and before advertising or offering it for sale, "to determine whether possession of such material

continuance is within the discretion of the trial court. *Ungar* v. *Sarafite*, 376 U.S. 575, 589; *United States* v. *Little*, 567 F. 2d 346 (C.A. 8), certiorari denied, No. 77-6130, April 17, 1978. There was no abuse of that discretion in this case.[3]

4. Equally misconceived is petitioner's contention (Pet. 13-15) that the government's production of the IRS

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violates any local law." Thus the situation that occurred here is not likely to recur.

In any event, petitioner was fully entitled, as he did, to argue to the jury that the IRS action was persuasive evidence that the materials were not in fact obscene. But as the district court rightly concluded (Pet. App. 30a-31a), neither the IRS sale, nor the decision not to prosecute the IRS agents involved, constituted a binding determination that the materials were not obscene. As the Ninth Circuit said in *Spillman* v. *United States*, 413 F. 2d 527, 531, certiorari denied, 396 U.S. 930, in regard to a similar claim that the government's mailing of obscene materials estopped it from asserting that the defendants had violated the law by mailing the same materials:

> The question of whether the governmental employees connected with the postal authorities have violated the law would not be relevant to the issue of appellant's guilt or innocence. Obviously, when an agent mailed the evidence (films) during the course of the investigation it was without any specific intent to violate the law. The appellant's contention that he was being denied due process of the law on account of the non-prosecution of the governmental employees is wholly lacking in merit.

Much less would these governmental actions authorize the trial court to rule, as a matter of law, that the materials were protected. Furthermore, the latter point was not urged at trial or in the court of appeals and is therefore not now properly presented for review. *United States* v. *Lovasco*, 431 U.S. 783, 788 n. 7; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2.

[3]Petitioner's request (Pet. 21) that this Court review the materials is not well founded. Independent review is to be made only when necessary. *Miller* v. *California*, 413 U.S. 15, 25. Given the absence of merit to petitioner's claim, this is not such a case.

materials on the morning of trial deprived him of due process of law under *Brady* v. *Maryland*, 373 U.S. 83.

In the first place, because the information petitioner sought was a matter of public record, it is unlikely that it qualifies as *Brady* material, *i.e.*, "information * * * known to the prosecution but unknown to the defense." *United States* v. *Agurs*, 427 U.S. 97, 103. Furthermore, the prosecution in this case had no knowledge of the sale conducted by the IRS (Pet. App. 28a). Finally, *Brady* material need not be made available until trial. See *United States* v. *Dotson*, 546 F. 2d 1151, 1153 (C.A. 5); *United States ex rel. Lucas* v. *Regan*, 503 F. 2d 1, 3 (C.A. 2), certiorari denied, 420 U.S. 939.[4]

5. Although no minutes exist of the grand jury proceedings (Tr. 11), petitioner contends (Pet. 16-17) that the trial court should have dismissed the indictment because the government allegedly failed to advise the grand jury as to the elements of the offense.

Even assuming that petitioner's unfounded charge is true, it is well settled that review of grand jury proceedings extends only to whether the grand jury is legally constituted, unbiased, and its indictment valid on its face. See *United States* v. *Calandra*, 414 U.S. 338; *Lawn* v. *United States*, 355 U.S. 339; *Costello* v. *United*

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[4]Petitioner argues (Pet. 13-15) that *Brady* material must be supplied well in advance of trial. He cites three cases, none of which supports this proposition. *United States* v. *Leichtfuss*, 331 F. Supp. 723 (N.D. Ill.); *United States* v. *Gleason*, 265 F. Supp. 880 (S.D. N.Y.); *United States* v. *Ladd*, 48 F.R.D. 266 (D. Alas.). Both *Leichtfuss* and *Ladd* state that the government must turn over to the defendant any exculpatory material prior to trial, but they set no time requirement. *Gleason* states that *Brady* materials may not have to be provided until trial (265 F. Supp. at 884), although it notes that in some instances, where the use of the materials would assist in effective trial preparation, they should be supplied before trial. *Id.* at 885.

States, 350 U.S. 359. Petitioner makes no such claim. As the district court said in rejecting this "completely frivolous" argument, petitioner was "adequately protected" by that court's instructions to the jury (Pet. App. 31a-32a).

6. Petitioner further contends (Pet. 17-19) that the indictment improperly charged him with multiple counts of the same offense because he was charged separately for each of his mailings. This contention lacks merit. Under the mail fraud statute, 18 U.S.C. 1341, each use of the mails is a separate offense despite the fact that the defendant may be engaged in only one fraudulent scheme. *Badders* v. *United States*, 240 U.S. 391; *United States* v. *Crockett*, 534 F. 2d 589 (C.A. 5); *United States* v. *Calvert*, 523 F. 2d 895 (C.A. 8), certiorari denied, 424 U.S. 911. Applying this reasoning here, charging separate offenses based on separate mailings was proper.[5]

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[5]The cases cited by petitioner do not support his contention. In *United States* v. *Harman*, 38 Fed. 827 (D. Kan.), an 1889 case, the district court ruled that since the same publication was sent to four individuals, in four separate mailings, there was one offense. Here, petitioner mailed different publications. *Bramblett* v. *United States*, 231 F. 2d 489 (C.A. D.C.), certiorari denied, 348 U.S. 503, involved the falsification of disbursing documents by a member of Congress, who received monthly checks made out to a member of his staff. The court held that the statute involved, 18 U.S.C. 1001, was designed to punish a pattern of conduct, and not to penalize each act in a series of acts which manifests the pattern. *Dimenza* v. *Johnston*, 130 F. 2d 465 (C.A. 9), held that, under an earlier version of the bank robbery statute, bank robbery by the use of deadly weapons was the same as bank robbery aggravated by the use of a deadly weapon and thus only one offense should have been charged. Cf. *Simpson* v. *United States*, No. 76-5761, decided February 28, 1978.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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